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June 17, 2019

Robert Teel
MuckRock News
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Dear Mr. Teel:

I write in response to your email dated March 6, 2019, under the Minnesota Government Data Practices Act ("MGDPA"). You request copies of the "large number of documents that had not been previously public" in the case captioned *State of Minnesota v. 3M Co.*, No. 27-CV-10-28862 (Minn. Dist. Ct. filed Dec. 30, 2010).

The MGDPA obligates this Office to make available "government data" classified as "public" to those who request access to it. The MGDPA defines government data as "all data collected, created, received, maintained or disseminated by any government entity regardless of its physical form, storage media or conditions of use." Minn. Stat. § 13.02, subd. 7. Not all government data maintained by this Office is public, however, as explained below.

First, although the MGDPA establishes a presumption that government data are public unless otherwise classified, Minn. Stat. § 13.03, subd. 4, provides that the classification of data "shall change" if required "to comply with judicial or administrative rules pertaining to the conduct of legal actions," which includes the rules governing protective orders. As you may know, the district court entered and filed the Protective Order Governing Confidential Information on August 17, 2011. Pursuant to the order, this Office may not disseminate documents to third parties that 3M designated as "confidential information" during the litigation, irrespective of such documents' classification under the MGDPA. *See* Order ¶¶ 7-8; *see also* Minn. Stat. § 13.03, subd. 4. The order did not terminate at the conclusion of the case and further provides that it "shall remain in full force and effect until further order of the Court." Order ¶ 19. The State, therefore, cannot disclose documents marked confidential pursuant to the order that have not been de-certified as confidential by the producing party. *Id.*

Second, "[d]ata collected by a government entity as part of an active investigation undertaken for the purpose of the commencement or defense of a pending civil legal action, or which are retained in anticipation of a pending civil legal action, are classified as protected nonpublic data . . . in the case of data not on individuals . . . and confidential . . . in the case of data on individuals." Minn. Stat. § 13.39, subd. 2(a). The MGDPA defines "protected nonpublic

data” as “data not on individuals made by statute or federal law applicable to the data (a) not public and (b) not accessible to the subject of the data.” Minn. Stat. § 13.02, subd. 13. “Confidential data on individuals” is defined as “data made not public by statute or federal law applicable to the data and are inaccessible to the individual subject of those data. *Id.* at subd. 3.

Third, this Office provides legal services to various state agencies. Minnesota Statutes section 13.393 provides that “dissemination of data by an attorney acting in a professional capacity for a government entity shall be governed by statutes, rules, and professional standards” generally applicable to attorneys. Thus, documents, information, or communications protected by the attorney-client privilege or attorney work product doctrine are not publicly available under the MGDPA. *See, e.g.*, Minn. Stat. § 595.02(b) (attorney-client privilege); Minn. R. Prof. Conduct 1.6 (attorney-client privilege); *Brown v. Saint Paul City Ry. Co.*, 62 N.W.2d 688, 700 (Minn. 1954) (describing attorney-client privilege); *Kobluk v. Univ. of Minn.*, 574 N.W.2d 436, 440 (Minn. 1998) (recognizing the purpose of the attorney-client privilege “is to encourage the client to confide openly and fully in his attorney without fear that the communications will be divulged and to enable the attorney to act more effectively on behalf of his client”) (quotations omitted). As such, this Office’s communications are subject to a number of legal privileges, including the attorney work product, the attorney-client, and the deliberative process privileges. *See, e.g.*, Minn. Stat. § 595.02, subd. 1(b) & Minn. R. Evid. 501. Such communications are further subject to the common interest doctrine, which provides an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997) (if two or more entities with a common interest, whether it be legal, factual or strategic, are represented by counsel and agree to share information in a matter, privileged matters will retain that privilege as to outside parties); *see also, e.g., Cohen v. Beachside Two-I Homeowners’ Ass’n*, No. CIV. 05-706 ADM/JS, 2006 WL 1795140, at *5-6 (D. Minn. June 29, 2006); *cf. State ex rel. Humphrey v. Philip Morris, Inc.*, 606 N.W.2d 676, 682 n.2 (Minn. Ct. App. 2000).

Subject to these limitations, this Office provides the following link where you may download the public government data currently available and responsive to your MGDPA request:

https://secure.ag.state.mn.us/public/file/pGRVe0saB0_YNzwwOZOag/20190617_Teel.zip

The password required to access these files is: HP4l*2&LqD. Please note that this link expires on July 1, 2019.

Robert Teel
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I thank you for your e-mail. Let me know if you have any questions or concerns.

Sincerely,

A handwritten signature in black ink that reads "Christie B. Eller". The signature is written in a cursive, flowing style.

CHRISTIE B. ELLER
Deputy Attorney General

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